No. 3079.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE.

[NOTE: Figures in brackets refer to pages of printed transcript of record.]

NATURE OF ACTION AND DEFENSES:

Plaintiff in error (hereinafter, for convenience, called the Railway Company) was defendant in the court

below in an action brought by the United States of America (hereinafter, for convenience, called the Government) to recover penalties for sixteen alleged violations of an Act of Congress approved March 4th, 1907 (34 St. L. 1415), entitled "An act to promote the safety of employes and travelers upon railroads by limiting the hours of service of employes thereon" (hereinafter, for convenience, called the Hours of Service Act).

The complaint [5-22], containing sixteen counts, alleged service in excess of sixteen hours by the crews of three separate trains, as follows:

Counts 1 to 6 charge that six employes, constituting the crew of freight train "Extra 3203 East" or "First 34 D," were on duty on a run easterly from Bakersfield to Barstow from 4:50 p. m., October 4th, to 11:05 a. m., October 5th, 1914, or 2 hours 30 minutes overtime [6-11].

Counts 7 to 11 charge that five employes, constituting the crew of freight train "Extra 955 West," were on duty on a run westerly from Needles to Barstow from 1:20 p. m. on October 10th, to 6:20 a. m. on October 11th, 1914, or 1 hour overtime [12-16].

Counts 12 to 16 charge that five employes, constituting the crew of freight train "Extra 1656 East," were on duty on a run easterly from Barstow to Needles from 9:15 p. m. on October 21st until 2:15 p. m., October 22nd, 1914, or 1 hour overtime [17-21].

The Railway Company admitted the service as alleged but in its answer [24-30], which followed the form approved by this Honorable Court in the case of

United States v. Southern Pacific Company, 220 Fed. 745, set up that the retention of employes in service in excess of sixteen hours was, in each instance, due to one of the causes enumerated in the proviso of section 3 of the Hours of Service Act.

Upon such pleadings the cause was tried to a jury for eight days. Twenty-four witnesses testified at length and considerable documentary evidence was introduced. The Railway Company, having assumed the burden of proof, undertook to establish to the satisfaction of the jury that, with respect to each of the three trains involved, it did everything possible, consistent with the practical operation of its railway, to enable it to foresee and avoid the accidents whereby the trains were delayed; that, before permitting any of such trains to start upon their respective runs between terminals, it exercised all diligence which reasonably prudent men under like circumstances and with like knowledge could have exercised for the purpose of ascertaining and knowing that all equipment therein was in such perfect condition and repair as to render it impossible for anyone reasonably to anticipate any of the accidents which befell the several trains; that each train and all of the equipment therein was, in accordance with the best known custom and usage prevailing on well operated railways throughout the United States, adequately and properly inspected; that, notwithstanding such precautions, each of said trains broke in two and was delayed by unavoidable accidents which no degree of human care, skill or foresight could have prevented and as the result of causes which were not

known and which could not have been foreseen when the trains started on their runs; that everything humanly possible was done to minimize such delays and to overcome the effects and consequences thereof; and, that, in each instance, the excess service charged was less than the time consumed by the delays which were the direct and proximate cause of the excess service.

Evidence applicable to all counts and particular evidence relating to specific sets of counts was introduced.

Facts Common to All Counts:

The Railway Company, a common carrier of freight and passengers in interstate commerce, operates a railway system extending from Chicago to the Pacific Coast, including 2400 miles of a "grand division" west of Albuquerque called "Coast Lines" [42] which were, in turn, divided into convenient operating "divisions" each in charge of a division superintendent. The trains here involved moved over "Arizona Division," which was subdivided into three "districts" with but two of which, consisting mainly of single track [47], are we concerned—the "third district" embracing 141 miles between Bakersfield and Barstow and the "second district embracing 169 miles between Barstow and Needles through sparsely populated desert territory and over mountains and heavy grades [42].

With due regard to an assured water supply, grade conditions and other essential considerations there were maintained at Bakersfield, Barstow and Needles, only, what are known as division terminals [44-50] between

which freight trains could ordinarily be operated well within sixteen hours. The usual and ordinary running time between these terminals was from 12 to 12½ hours, including delays usually attendant upon operations [44].

Evidence Excluded:

The railway company undertook to show "what changes in methods, practices and properties" it had made subsequent to and in anticipation of the effective date of, the Hours of Service Act to enable it, in the exercise of reasonable care, prudence and foresight consistent with the practical operation of its railway" to meet the new conditions created by the act and the secure compliance therewith. To all such testimony the Government interposed objections which were sustained (by rulings to which exceptions [92-93-195] were duly allowed) and the Railway Company, thereupon, offered to prove that, anticipating the effective date of such act and to minimize the possibility of its violation, it had expended more than two million dollars upon the particular districts here involved in double tracking its line at certain points, in extending sidings, installing additional sidings, facilitating distribution of fuel and other improvements. To the rulings refusing such offer exceptions [93-195] were duly allowed. Such rulings of the trial court have been duly assigned as error and are covered by assignment I [302] of the assignment of errors.

Further Facts Bearing on All Counts:

As applicable to all counts there was introduced a vast amount of oral testimony and documentary evidence relating to and bearing directly upon the matters following: the adequacy of foresight exercised by the Railway Company in establishing and maintaining its "Division Terminals" [43-44-50-51-181]; density of traffic and number of trains moved over said "districts" [52-185]; difficulties attendant upon and care exercised with respect to the operation of freight trains [45-81-185]; the degree of care exercised by the Railway Company habitually and at the times charged in the complaint in constructing, overhauling, repairing, inspecting, testing and operating its engines, trains and cars [47-49-54-55-56-60-77-79-126-162-207]; methods of despatching freight trains and of avoiding and overcoming congestion [45-127-165]; the "tonnage rating" of engines, meaning the load which engines, after being subjected to dynamometer and other tests, are deemed capable of hauling over the district to which they are assigned safely and without being overloaded and which was adhered to with respect to trains involved [56-128-131-202-282-283]; the direct and consequential effects of trains breaking in two and methods employed to prevent and to overcome delays resulting therefrom [46-63-69-84-126-140-144-182-185]; methods employed by the Railway Company with respect to constructing, installing, inspecting and testing draft-timbers, draw-bars, couplers and knuckles [49-59-60-63-69-77-79-82-84-87-97 - 126-167-168-190-191-209-237 - 238-242-255-256-262], which were superior to methods

generally employed [63-69-84-126] and which subjected each of the several cars to at least two inspections by competent car inspectors—one upon arrival at terminals when incoming trains were "stretched" before being broken up [237-238] and another before departure from such terminals—after which trains were again "stretched" [49-126-167-191-238] to determine the sufficiency of and to admit of best possible inspection of couplers, draft rigging, draw-bars and other appliances [168-238], such methods having been proven by practical experience to afford all possible protection consistent with practical operation against delays incident to trains breaking in two [49-61-68-126-167-168-179-191-238].

Such general testimony can all be summarized in the uncontradicted and irrefutable evidence that the railway of the Railway Company and each of the three trains in question were well operated in accordance with the best known custom and usage prevailing among well operated railways throughout the United States [43] as emphasized by the fact that upon other well operated railways the percentage of trains which break in two when operated under similar grade conditions averaged about two per cent while on the division in question such percentage had, by reason of the superior methods and practices shown by such evidence [63-69-84-126-168-191] been *reduced to less than one per cent of all trains operated* [51].

Facts Regarding Counts 1 to 6 Inclusive:

After having been on duty 45 minutes the crew of a "fast freight" train [101] designated as "Extra 3203 East" or "First 34 D," consisting of 44 cars (including G. C. & S. F. 4086 and S. F. P. & P. 913] with engine 3203 at the head end and engine 965 cut in fifteen cars from the rear end [101] for the purpose of "helping" the train up the hill to Summit [109-111] left Bakersfield at 5:35 p. m. Oct. 4th [101], but while ascending Tehachapi Mountains on single track [105], over which both Southern Pacific and Santa Fe trains operate jointly [43-125], where there are sharp curves [175] and where the maximum grade is 2.2 per cent [43-105-137], the train was delayed at Cable—a non-agency station [128]—for 2 hours 55 minutes from 11:50 p. m. Oct. 4th until 2:45 a. m. Oct. 5th [103] by the pulling of a draw-bar out of the west end of car S. F. P. & P. 913, blocking the main line [114-180], necessitating placing such car at the rear of the train [108] and by pulling the draw-bar out of the pilot and blowing a water plug out of the low pressure cylinder of engine 965 [103-114].

Previous to the delay at Cable the train had been delayed 15 minutes at Allard by a broken knuckle in car G. C. and S. F. 4086 [103-113], which had been inspected and found to be in good order and to conform to requirements of the Safety Appliance Act before it left Bakersfield [123-126], as had also car S. F. P. & P. 913 [95-96].

Engine 956 had recently been overhauled [67-68-72-75], and notwithstanding a slight crack in its saddle

[61-68-119-149-153-155-172-179] it was in first class condition [68-71-113-150-152], conformed to all Federal requirements [69-92-121-294], its previous performances had been satisfactory [71-111-158], as were its subsequent performances [151], it had been properly inspected [111-152], the train was properly operated [130-176-178] and there was nothing in its condition [111-113-130-151-164] nor was there any other condition [102-111-130-175] to cause anyone to anticipate the direct and consequential delays which were encountered and but for which the train would have reached Mohave at 2:00 a. m. [134-135-146] and been handled into Barstow by 8 a. m. on Oct. 5th [182] well within sixteen hours [104].

Facts Relating to Counts 7 to 11 Inclusive:

Train "Extra 955 West," enroute from Needles to Barstow, was delayed at Danby, 65 miles west of Needles, from 9:10 p. m. until 10:10 p. m. Oct. 10th, as the unavoidable consequence [215] of an opposing train, "Extra 1641 East," twice breaking in two when, owing to a concealed defect not ascertainable by inspection [201-217-254-260-269], a knuckle broke on car A. T. 86671 [200] and the draw-bar pulled out of car D. S. L. 51202 by reason whereof the main line at a point 115 miles east of Barstow was blocked [96-199]. The cars which caused "Extra 1651" to break in two had been properly inspected [235-243-245-247-248-250-252-253-258-211] before that train left Barstow and enroute [261], and when "Extra 955" left Needles there was nothing which would cause anyone to foresee

that it would not reach Barstow well within 16 hours, as it would have done but for the delays to which it was subjected, or to forsee that the opposing train, 1461, would break in two and block the main line [261-263-199-278].

Facts Relating to Counts 12 to 16 Inclusive:

Train "Extra 1656 East," after leaving Barstow enroute for Needles at 10:00 p. m. on Oct. 21st, was delayed at Mile Post 691, 56 miles east of Barstow [288] for 4 hours and 25 minutes from 2:20 a. m. until 6:45 a. m. by the pulling out, as the result of a concealed defect not ascertainable by inspection [282-290], of a draw-bar on car C. M. & St. P. 25406 and A. T. 72821, which had previously been inspected at Barstow [236-239-244-245-247-248-249-250-251] without any defects having been discovered therein which would cause anyone to foresee that it would be subjected to the delays which it encountered [279], and but for which it would have reached Needles well within 16 hours from the time the crew went on duty [292].

At the conclusion of the evidence offered by the Railway Company the Government, having offered no evidence, moved the trial court "to instruct the jury to find for the plaintiff" [295]. Such motion was allowed [295], as appears from the decision thereon, the text whereof is reported in 236 Fed. at page 154 and is, therefore, omitted herefrom and from the printed transcript [295] to promote brevity. To the granting of said motion [295] and to the order directing judgment upon the verdict in favor of the plaintiff returned pur-

suant thereto [296] the Railway Company duly reserved exceptions, which are made the subject of assignments III to XVIII inclusive of our assignment of errors [303-314]. A writ of error was thereafter duly applied for and allowed [316], a bill of exceptions timely settled and allowed [299] and the cause is here for review upon numerous assignments of error [301-315] all of which are generally stated and summarized in the following:

SPECIFICATION OF ERRORS.

First: That the trial court erred in excluding the evidence sought to be introduced by the Railway Company by questions propounded to witness John A. Christie [92] and to witness William Mathie [195] as to changes in methods, practices and properties made by the Railway Company upon the divisions in question in anticipation of the effective date of the Hours of Service Act and for the purpose of insuring compliance therewith and in refusing the offer of proof made by the Railway Company with respect thereto because such testimony was relevant, competent and material as tending to show that the Railway Company, in the exercise of such proper care, prudence and foresight as was consistent with the practical operation of its railway, had taken proper precautions to minimize the possibility of crews being kept on duty between terminals in excess of 16 hours and because such testimony tended directly to establish the plea of justification and excuse set forth in the answer.

Second: That the trial court erred in refusing to permit the Railway Company to show by witness John A. Christie [93] and thereafter by witness William Mathie [195] that anticipating the effective date of the Hours of Service Act, and for the purpose of minimizing the possibility of violating that statute, the Railway Company upon the particular division here involved had expended upward of $2,000,000.00 in double tracking, in extending sidings and in installing additional sidings, in arranging for the transportation by pipe line of fuel oil which otherwise would have to be transported by trains for the purpose of showing the precautions which had been taken to enable trains to be so run over said division as to minimize the possibility of violations of said Hours of Service Law.

Third: That the trial court erred in rejecting and refusing the following offer of proof made by the Railway Company at the trial:

"I offer to prove by this witness that, anticipating the effective date of the Hours of Service Act, and for the purpose of minimizing the possibility of violating that statute, the defendant company, upon the particular division of which Mr. Christie, the witness, is in charge, has expended upwards of two million dollars in double-tracking, in extending sidings and in installing additional sidings, in arranging for the transportation by pipe-line of fuel for engines, which otherwise would have had to be transported by trains; and this for the purpose of showing the precautions taken by the defendant for the purpose of

enabling its trains to be so run over that division as to minimize the possibility of violations of the Hours of Service Law." [92-93-195.]

Fourth: That the trial court erred in sustaining plaintiff's motion to direct a verdict for the Government for the reasons following:

(a) Because the grounds upon which such motion was based were not stated by reason whereof neither the court nor the Railway Company was apprised of the grounds relied upon by the Government in support thereof;

(b) Because the evidence introduced by the Railway Company fully sustained its plea of justification and excuse for the excess service charged;

(c) Because, at all events, the evidence introduced by the Railway Company to sustain the plea of justification and excuse set forth in its answer raised questions of fact for the exclusive determination of the jury and the trial court in attempting to review, and to direct a verdict upon, such evidence thereby invaded and usurped the province of the jury to the prejudice of the rights of the Railway Company in the premises;

(d) Because said ruling of the trial court upon said motion was contrary to the plain terms and provisions of the Hours of Service Act and to any reasonable construction thereof; and

(e) Because said ruling of the trial court upon such motion was contrary to and in conflict with the practical contemporaneous construction theretofore placed upon said Hours of Service Act by the administrative body to which, by the terms thereof enforcement of said act was entrusted.

Fifth: That the trial court erred in granting the Government's motion for a judgment upon the verdict theretofore directed because it affirmatively appeared from the evidence that the retention in service of the employes, as alleged, was not violative of the Hours of Service Act for the reasons following:

(a) The delays to which the several trains and employes in charge thereof were subjected were, in each instance, the results of causes not known to the Railway Company or to any officer or agent in charge of such employes at the time such employes left a terminal and which could not have been foreseen; and

(b) That the retention of such employes in service was, in each instance, the result of a casualty and an unavoidable accident which justified retention of such employes in service in excess of 16 hours under the circumstances set forth in the answer and shown by the evidence introduced thereunder until such employes reached the next terminal or relay point—such retention in service having been expressly authorized by said Hours of Service Act.

Sixth: That the trial court erred in finding, in effect, that it was the duty of the Railway Company to relieve the employes after they had been on duty 16 hours before they reached a terminal or relay point because under the circumstances disclosed by the evidence said Hours of Service Act did not require that such employes be relieved until they reached some terminal or relay point.

Seventh: That the judgment under review is contrary to the evidence with respect to each of the several counts because it affirmatively appears therefrom that the retention of the several employes in service was not violative of the Hours of Service Act which in the circumstances did not apply to or prohibit, but which, on the contrary, expressly authorized such service.

Eighth: That the judgment for the Government and the whole thereof was contrary to law because:

(a) The delays to which each of the three trains and the employes thereof were subjected were the results of causes which justified the retention of the employes in service for such period in excess of 16 hours as would enable such employes to complete their runs to a terminal or relay point so long as they did not pass through any division terminal or relay point at which relief crews were available; and

(b) That said judgment was based upon the erroneous view of the trial court that it was the duty of the Railway Company to relieve said employes before they reached some terminal or relay point at which relief crews were available.

Ninth: That the trial court erred in holding in effect:

(a) That the delays to which the several trains were subjected were not the result of causes specified in the proviso; and

(b) That, even had they been, it was, nevertheless, the legal duty of the Railway Company to refrain from permitting the crews so delayed to continue to the next

terminal or relay point at which extra crews were available.

ARGUMENT.

First Proposition.

EVIDENCE OFFERED WAS IMPROPERLY REJECTED TO THE PREJUDICE OF THE RAILWAY COMPANY.

Argument under this proposition relates to our first, second and third specifications of error.

The evidence offered by the Railway Company as to the changes in methods, practices and properties made, and precautions taken, by it to secure compliance with the Hours of Service Act and to minimize the possibility of violations thereof [92-93-195-196] was clearly competent as bearing upon the question as to whether or not the Railway Company had exercised "that high degree of diligence and foresight consistent with the object aimed at and the practical operation of its railroad," and as showing "that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded."

The exclusion of such evidence from the consideration of the jury was, therefore, prejudicial because, as this court ably pointed out in the case of S. P. L. A. & S. L. R. Co. v. U. S., 220 Fed. 737, the Hours of Service Act "was not made effective within the usual time, but its going into effect was postponed for one year—the purpose being, as stated by the Supreme Court in the case of Northern Pacific Railway Co. v. Washing-

ton, 222 U. S. 370-379, 32 Sup. Ct. 160-162, 56 L. Ed. 237, 'to enable all necessary adjustments to be made by the railroads to meet the new conditions created by the act.' "

The testimony rejected was offered by the Railway Company for the purpose of showing, in the only feasible way in which it could be shown, that it had exercised that high degree of diligence, care and foresight required of it by said act as construed by the courts and as establishing its defense that the delays in the circumstances resulted from no lack of diligence or reasonable foresight upon its part, but were the results of casualties, unavoidable accidents and causes which were not known to the carrier or its officers or agents in charge of the employes at the time they left their respective terminals and which could not have been foreseen.

The exclusion of such testimony by the trial court deprived the Railway Company of a substantial right to which it was justly entitled. At all events the Railway Company should have been permitted to show all facts and circumstances surrounding the delays so that the jury might determine whether it had exercised that degree of care, diligence and foresight encumbent upon it both in preventing and thereafter in overcoming the effects of such delays.

The action of the trial court in excluding such testimony was, we submit, highly prejudicial to the Railway Company and deprived it of a substantial right and it cannot, therefore, be said that the exclusion of such testimony falls within the category of "harmless error."

Second Proposition.

The Effect of the Holding of the Trial Court Is to Nullify the Proviso.

The argument under this proposition relates to our remaining specifications of error, which for convenience will be discussed as a whole instead of separately.

Assuming for present purposes that our Federal courts may, without doing violence to the plain provisions of the Federal Constitution, direct verdicts in proper cases they certainly should not encroach upon the province of the jury in a case of this character, and thereby impair the important constitutional guarantee of trial by jury, save and except in cases where, from all of the facts and circumstances, no inference can reasonably be drawn inconsistent with that which the court assumes to find as an ultimate fact or in those cases where both parties to a cause, respectively, move for a directed verdict in their favor.

The dominating purpose of the seventh amendment is the preservation of the right of trial by jury by a stability of procedure. This right has, as was said by Mr. Justice Miller, "been fixed upon the judicial system of the United States with the utmost rigidity."

It cannot be said that there was no evidence upon which the jury could, with perfect propriety, have proceeded to find a verdict in favor of the defendant upon the affirmative defenses whereunder it had assumed the burden of proof.

It is respectfully submitted that whether there is in fact a violation of the law depends upon the circum-

stances surrounding each particular case and which may or may not justify the application thereto of a given rule.

The facts in this case differ essentially from those which were involved in the case of U. S. v. The A. T. & S. F. Ry. Co., 220 Fed. 748, in which the decision of this Honorable Court was thereafter affirmed by the United States Supreme Court, 244 U. S. 336, 37 S. C. R. 69, 61 L. Ed. 1175. In that case, after the crew had been on duty more than sixteen hours, the train involved was run through a division terminal or relay point at which there was available a crew which could have been placed in charge of the train previously delayed and it was held that the Railway Company should have substituted a new crew at San Bernardino, which was a terminal, and not required the further services to Los Angeles and the holding of the Supreme Court is summarized in the statement, *"We reach the conclusion that in keeping the crew in service beyond San Bernardino the company was guilty of a violation of the statute."*

The construction of the act for which we now contend contemplates the continuance in service of crews whose runs have been delayed by casualties and by causes which were not known and which could not have been foreseen when they started upon their runs only until such crews reach the next terminal or relay point at which, in the exercise of reasonable care, they may be relieved.

The purpose of the Hours of Service Act is to promote the safety of employes and travelers upon railways

to the extent that Congress has evinced its intention as expressed in the language used in the act, particularly in the proviso in question.

The statute must be applied in a reasonable and practical way. Like all laws, it must be workable in a practical manner and not ingeniously construed to impose conditions which are onerous and harsh and which are wholly inconsistent with the nature of the business to which it relates.

The proviso says:

"The provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of such employe at the time said employe left a terminal and which could not have been foreseen."

If, as the proviso clearly states, the effect of the happening of a casualty or of an unavoidable accident or of a delay, the cause of which was not known and which could not have been foreseen when the employes started upon their trip, is that "the provisions of this act shall not apply," then neither the requirement of relief at the expiration of sixteen hours, nor any other requirement of the act, was longer applicable until the employes reached *some* terminal or relay point (although not necessarily that to which they had originally started) at which they can, in the exercise of reasonable care, be relieved, for it was clearly neither the purpose nor intention of Congress to require that crews which have been delayed enroute by causes specified in the proviso should be tied up at whatever point they

might happen to be at the expiration of sixteen hours and that relief crews be sent out for the purpose of taking the train in to the next terminal or relay point. The clear purpose of the proviso was to incorporate into the law some comprehensive clause which, without enumerating all contingencies to which it was recognized railway operations were necessarily subjected, would expressly authorize crews which, after starting upon their runs, meet with casualties or unavoidable accidents or unexpected delays from causes which were not known and which could not have been foreseen before the run was commenced, to complete such runs to the next terminal or relay point at which relief crews are available without subjecting their employer to the penalty of the act.

The statute was passed with a view to facilitating commerce and not of unnecessarily hampering the practical operation of railways and it should, therefore, receive such a practical and reasonable construction as will accomplish that purpose. It is obvious that had Congress intended that crews delayed by causes mentioned in the proviso should be tied up enroute at the expiration of sixteen hours and a relief crew sent out and substituted for the crew delayed, the words incorporated in the proviso of the act were wholly unnecessary because a mere prohibition against any service in excess of sixteen hours would have accomplished that object.

The decision under review extends beyond the scope and purpose of the act, and, in effect, makes a railway company an absolute insurer against any service in

excess of sixteen hours regardless of the causes of the delay which necessitates such services. The decision of the trial court undertakes, by interpretation, to make an entirely different law than that which Congress intended to enact, and to impose exactions which are wholly inconsistent with the practical necessities of railway operations, and, we respectfully submit, contrary to the decisions of this and other Circuit Courts of Appeal.

We concede that under the act and under the decisions of this court the burden was upon the Railway Company to show, by a fair preponderance of all the evidence in the case, that it exercised such diligence and foresight consistent with the objects of the law and the practical operations of the railroad as reasonably prudent men under like circumstances and with like knowledge and responsibilities would have exercised for the purpose of avoiding those things which were shown by the evidence to have caused the trains to break in two and the delays caused thereby, but *our understanding of the law is that whether such a showing was made was a question of fact which should have been submitted to the jury for its determination.*

This court held in the case of U. S. v. Northern Pacific Railroad Company, 215 Fed. 64, in affirming a directed verdict in favor of the Railway Company that a derailment which tore up a piece of track and demoralized traffic was a casualty within the meaning of the proviso, the happening of which, under the circumstances shown, justified the excess service charged.

In the case of U. S. v. Kansas City So. Ry. Co., 202 Fed. 828, the railway company, for the purpose of bringing itself within the proviso, relied upon an engine failure due to the engine not steaming on account of poor coal and a broken shaker rod. The Eighth Circuit Court of Appeals, in reversing the action of the trial court in directing a verdict for the defendant, after considering questions of pleading, said:

"To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at and the practical operation of its railroad. * * * delays * * * from all the usual causes incidental to operation are not, standing alone, valid excuses, within the meaning of the proviso. The carriers must go still further and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded. * * * *The case should have been submitted to the jury, under appropriate instructions, to determine whether the defendant had taken sufficient precautions to see that its engine was in proper condition when it started, and whether the delays which occurred were the result of causes which could not have been foreseen by exercise of necessary diligence and foresight.*" (Our italics.)

The Second Circuit Court of Appeals in three cases in which the facts were similar to those here involved sustains our view that where a showing is made, such as

is disclosed by the record in this case, the cause should be submitted to the jury under proper instructions.

U. S. v. Lehigh Valley R. Co., 219 Fed. 532;
U. S. v. N. Y. C. & H. R. Co., 218 Fed. 611;
U. S. v. D. L. & W. R. Co., 218 Fed. 608.

In the Lehigh Valley case (219 Fed. 532) the court said:

"The casualties or unavoidable accidents * * * relied on * * * were an unusually high wind while the train was going up grade, a broken tail pin and a hot box. The delays occasioned by a concurrence of all three caused the statutory hours of service to be exceeded. *The breaking of parts of cars or engine and the heating of journals are matters of not infrequent occurrence, and are guarded against by inspection and carefulness in handling trains. Inspection and care will not wholly prevent breakage or heating, but they will make such accidents less frequent.* (Then after citing cases.) In the case at bar there was testimony as to the nature of the flaw in the tail pin and also as to what had been done as to packing and inspecting of the bearing which heated. * * * *We think this testimony should have been submitted to the jury * * * under proper instructions.*" (Our italics.)

In the New York Central case (218 Fed. 611) evidence was introduced upon the trial that the movement of the train was delayed by a hot box and that while so delayed another train ran into a block while it was on the siding, thereby causing further delay. The case

was submitted to the jury which found for the defendant. The Government contended that a hot box is not such a casualty as would come within the proviso. In that case, as in that here under review, evidence was given in detail to show just what was done regarding inspection and the prevention of any delay and the jury had been instructed that "it remains for you to determine as a question of fact whether reasonable care was taken to anticipate such an occurrence." The Government duly excepted to an instruction to the jury that: If the delays in waiting for trains to pass were the necessary results of a hot driving box and the hot box was an excuse sufficient to bring defendant within the exceptions of the statute, then the delays in passing trains might be computed in figuring the time.

The court in affirming the judgment entered on the verdict of a jury in favor of the railway company recognized that consequential delays should also be computed in figuring the overtime resulting from casualties and said:

"It is pointed out that the time actually spent in cooling and repacking the heated box, one hour and a half, is insufficient to account for all the overtime. There is five to ten minutes additional. But it clearly appeared that, by the time the train in question had been put in proper condition to move on out of the siding where the box had been cooled and repacked, other trains had rung into the block into which this siding opened, and progress could not be made until they cleared it. *We find no error in giving the cause to the jury under these instructions.*" (Our italics.)

In the Delaware Lackawauna case (218 Fed. 608), the court, in affirming the direct verdict in favor of the railway company with respect to ten counts where, according to opinion "there was testimony that there was a flaw in the broken knuckle—four or five large sand holes where it broke—which could not be seen from the outside and could not have been discovered by inspection. There was also testimony by an inspector that he had inspected draft gearing, trucks, and couplers the afternoon before the train started. Another inspector testified to inspection of the engine of 1212, which blew out a cylinder head, the same afternoon. The testimony as to the movements of trains and the effect upon them of those several accidents was very full and detailed. The Government contended that the trial court "should have held as a matter of law that the defendant had not shown that the conceded overtime was within the language of the proviso of the statute." The Circuit Court of Appeals, in holding that the verdict of the jury was conclusive, remarked that the cases relied upon by the Government did not sustain its contention and, in referring to U. S. v. Kansas City Southern, 202 Fed. 828, said, "the case certainly is not authority for the proposition that, when there is evidence of such examination, the question whether the particular accident was or was not unavoidable should not be sent to the jury," and sustained the judgment upon the ground that, under the circumstances shown, "the verdict is conclusive as to the facts in controversy."

With respect to the remaining counts, where it was

shown that the blowing out of a cylinder head of one train induced the holding, to avoid congestion, of another train which was thereafter delayed at various points waiting for and passing still other trains, and further by reason of the fact that an opposing train broke a knuckle in the draw-bar and thereby blocked the track, the court, at page 611 of its opinion, says:

"It will be seen from this statement that elements important to be taken into consideration in determining whether or not casualty was within the terms of the proviso of section 3, *supra,* are the nature of the defect in the knuckle and the examination or inspections had, before the accidents, of knuckle and cylinder head. This testimony came from defendant's employes, and we think the Government was entitled to have this cause of action sent to the jury under appropriate instructions."

In the case of United States v. Great Northern Railway Company, 220 Fed. 630, the railway company, without any showing as to previous inspection of its equipment, relied upon the pulling out of draw-bars to bring itself within the proviso. The jury was told that it did "not have to find that the company inspected" and that "the question of inspection is not one bearing on the case * * * if you find that it was an accident and it caused delay, even though it was avoidable, the company could not be bound." The Seventh Circuit Court of Appeals in reversing the judgment for the railway company, after considering certain questions of pleading and evidence, said: *"On*

the evidence in the record the case was one to be submitted to the jury under proper instructions."

In none of the foregoing cases was there such an elaborate showing of diligence, care and foresight, either habitually or with respect to the particular trains involved as appears from the record in the case now under review, and yet in each instance it was held that the causes should have been submitted to the jury upon the evidence under proper instructions. These cases recognize that jurors are the proper triers of questions of fact and that cases should not be withdrawn from their consideration unless the trial court in the exercise of a sound judicial discretion would be compelled to set aside any verdict save that which it is sought to have directed.

It is, therefore, respectfully submitted that by withdrawing the case from the consideration of the jury and by holding that, notwithstanding the fact that the delays were the results of causes specifically enumerated in the proviso, the Railway Company was, nevertheless, as a matter of law, subject to the penalties of the act by reason of its failure to relieve the crews at the expiration of sixteen hours, the trial court committed error calling for a reversal of the judgment because the facts and circumstances surrounding this case should have been submitted to the jury in order that it might, under proper instructions, determine: First, whether the delays were due to causes specifically enumerated in the proviso, and Secondly, whether the Railway Company exercised due diligence to overcome the effects of such delays.

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